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No. 03-9659

IN THE

Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUGLAS DRETKE,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE*, FORMER PROSECUTORS AND JUDGES, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former judges and prosecutors, identified in the Appendix, who maintain an active interest in the fair and effective functioning of the criminal justice system. *Amici* are deeply committed to ensuring that criminal trials, and especially death penalty proceedings, are conducted in an atmosphere free of racial prejudice. Plausible allegations of race discrimination in the courthouse itself severely discredit the administration of justice and diminish its authority. They must be scrupulously reviewed in order to preserve public confidence in the criminal justice system, to safeguard the democratic right of all citizens to be fairly considered for jury service, and to assure just and reliable outcomes for individuals facing loss of life or liberty through the criminal process.

Judges serve as the ultimate guardians of the judicial process. In general, "[t]he courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the] prohibition [against discrimination in the selection of jurors]." *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

For their part, prosecutors exercise their duties as officers of the court to enforce the criminal laws. This Court has repeatedly underscored "the special role" of the prosecutor to ensure that justice is done even at the expense of the legitimate prosecutorial interest in securing convictions.

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. This brief was written with the assistance of Jessica Goneau, a student at the University of California School of Law (Boalt Hall). No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

Strickler v. Greene, 527 U.S. 263, 281 (1999). The prosecutorial function suffers when the criminal justice system operates in a discriminatory manner, including when peremptory challenges are used to exclude citizens from jury service based upon their race.

The question presented is critically important to the integrity of the trial process and to the effective administration of justice in a multiracial society. Members of the bench and law enforcement officials also bear responsibility for maintaining a justice system that honors the equal treatment of all persons and instills trust in the citizenry it serves, conditions that are necessary to the effective administration of justice.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT[3]

The Court's decision in *Miller-El* signaled its ongoing commitment to the promise of *Batson v. Kentucky*, 476 U.S. 79 (1986), through its detailed inspection of petitioner's "extensive evidence concerning the jury selection procedures" (Pet. App. 28a) and its insistence that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," nor does it preclude relief. *Id.* at 37a. As officers of the court, *amici* are concerned that too many citizens, particularly African Americans, believe that they do not receive equal treatment before the law and that juries are still unrepresentative. The public and law

[2] Two *amici* filed a brief in support of Thomas Miller-El's first petition for a writ of certiorari. *See* Brief of *Amici Curiae*, the Honorable Arlin M. Adams and Julie R. O'Sullivan ("*Amici* Cert. Brief"), *Miller-El* v. *Cockrell*, 537 U.S. 322 (2003) ("*Miller-El*"). Many of current *amici* then authored a brief on the merits. *See* Brief of *Amici Curiae*, Former Prosecutors and Judges, in Support of Petitioner, *Miller-El*, 537 U.S. 322 (2003).

[3] *Amici Curiae* adopt the facts and procedural history set forth in the petition for writ of *certiorari*.

enforcement community perceived this Court's earlier ruling in *Miller-El* as a highly visible reaffirmation of the Constitutional principles set forth in *Batson*. The public and law enforcement community are watching still, for *Miller-El* is now the leading case applying *Batson*.[4] Allowing the Fifth Circuit's ruling to stand would send a highly visible, detrimental signal that this Court has retreated from its clear ruling in *Miller-El*. *See* Pet. App. 3a.

Notwithstanding the Court's careful explication of how the third step of the *Batson* inquiry should be conducted by trial judges and by courts reviewing *Batson* claims under 28 U.S.C. § 2254(d)(2) & (e)(1), the Fifth Circuit rejected the majority's directives and adopted instead an illogically truncated framework for review. The result on remand is not a failure of evidence, but rather a failure of analysis.

Even within its own analytical framework, the Fifth Circuit could only reach the outcome it did by simply ignoring key aspects of petitioner's *prima facie* case. This Court, however, had highlighted those items of evidence as the source of some of its deepest concerns. For example, the Fifth Circuit ducks some of the most salient facts of all: stark racial disparity in the prosecution's use of its peremptory challenges and in its questioning of prospective jurors. As to those selective items of petitioner's evidence it does address, the Fifth Circuit omits crucial portions of that evidence (*e.g.*, that the prosecution's jury shuffling was done when the front of the panel contained a significant number of African Americans). *Amici* believe that a review of the totality of the evidence relied on by petitioner—conducted in the manner this Court prescribed in *Miller-El*—can lead to only one conclusion: the

[4] *See e.g.*, Shirley Baccus-Lobel, *Six Strikes and You're Safe: The All-White Jury*, 30 Litig. 14, 15 (2004) (In *Miller-El*, "the Court reinforced *Batson*'s promise of equal protection in the selection of citizens to judge maters of profound interest to both the parties and the community").

prosecution intentionally used peremptory challenges to exclude African Americans from the trial jury.

Finally, the Fifth Circuit's opinion strikes at the very heart of judicial integrity. It undermines public confidence in the jury system and in the principle that redress of constitutional violations can be achieved through the process of judicial review. *Amici* urge the Court to exercise its supervisory power to enforce *Batson's* safeguards and ensure that lower courts conduct appropriate review of *Batson* claims. The Court should grant the petition for a writ of *certiorari* and grant relief to petitioner.

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's Ruling Will Undermine the Public Reputation and Integrity of the Courts.

The diminished public confidence in the judicial system that results from discriminatory jury selection is of great concern to law enforcement. Prosecutors depend upon jurors to convict when the evidence warrants it. Moreover, where race is an issue or even *perceived* to be an issue in a case, it is essential that all ethnic groups in our diverse nation are satisfied that the verdict is the result of a fair process. *See Georgia v. McCullom*, 505 U.S. 42, 49 (1992). These important law enforcement interests will be harmed if the Court fails to stand firmly by its ruling in *Miller-El* and require that the lower courts follow its directions.

1. Nearly 20 years after *Batson* was decided and petitioner was tried and sentenced to death, race discrimination still has not been eradicated from the jury selection process. The persistent unconstitutional use of peremptory challenges has been demonstrated by empirical studies.[5] *Amici* share the

[5] *See, e.g.*, Kevin Collison, *WNY Study Urges Increase in Ranks of Minority Jurors*, Buffalo News, Apr. 19, 2000, at A1, *available at* 2000 WL 5675310; Pennsylvania Supreme Court Comm. on Racial and Gender Bias in the Justice Sys., *Final Report* 50-102 (2003), *available at* http://www. courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.pdf (racial and ethnic bias in jury selection, including a summary of findings in other states); David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001); Symposium, *Minnesota Court Task Force on Racial Bias in the Judicial System*, 16 Hamline L. Rev. 477 (1993).

Court's view that the peremptory challenge plays a "significant role" in our trial process, but one which can and "must be accommodated to the command of racial neutrality." *Powers*, 499 U.S. at 415.[6]

Batson was cited in almost 1,000 state and federal appellate opinions during the past two years, a figure that only hints at the frequency with which challenges to discriminatory jury selection practices are made in the trial courts.[7] While the majority of *Batson* claims challenge the conduct of prosecutors, *Batson*'s rules apply to defense counsel as well, ensuring that neither party to a criminal case can exclude jurors based on their race. *See McCullom*, 505 U.S. at 54. A significant percentage of these *Batson* claims may ultimately be rejected. However, knowledge that our courts faithfully adhere to the rule of law in separating the meritorious from the frivolous is essential to maintaining public trust.[8]

[6] *See Amici* Cert. Brief at 9. *See also* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. Mich. J.L. Reform 229, 274-75 (1993).

[7] A LEXIS search was performed on May 3, 2004, using the search term "Batson w/3 Kentucky," and restricting cases to the previous two years. The search was performed in the file "federal & state cases, combined." A LEXIS search using the same search parameters performed for 2001 found 440 state and federal court appellate decisions citing *Batson*. *See Amici* Cert. Brief at 2 & n.3. In short, there is no decline in the number of cases in which *Batson* is the subject of appellate review.

[8] In their brief in support of Mr. Miller-El's first petition for a writ of *certiorari*, *amici* surveyed cases over a two-year period in one state within the Fifth Circuit, Louisiana, in which prosecutors had used their peremptory challenges to strike most, if not all, African Americans from the jury. *See Amici* Cert. Brief at 9.

In May 2000, a blue-ribbon committee, including both supporters and opponents of the death penalty, examined the administration of our capital punishment system and "recommend[ed] ways to ensure that fundamental fairness is guaranteed for all." The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* ix (2001), *available at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. It sought to address "the potential for racial discrimination [that] hang[s] over our nation's capital punishment system." *Id.* at 23. The committee made clear the need for "vigorously enforcing *Batson v. Kentucky*" "to ensure that racial minorities are part of every decision-making process within the criminal justice system." *Id.* at 24.

2. According to an American Bar Association survey, the public's continued support for our justice system stems from its trust in the role of the jury.[9] This understanding of the significance of the jury as an institution derives in part from the decision in *Batson*, which recognized that the jury occupies a "central position in our system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson*, 476 U.S. at 86 (citing *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)); *see also Powers*, 499 U.S. at 411. By compromising the representative quality of the jury, racially discriminatory selection procedures undermine this critical safeguard. *See Batson*, 476 U.S. at 86 n.8. Beyond the injury to the fair trial process, the harm from discriminatory jury selection touches the excluded jurors and the entire community. *Id.* at 87; *see also Powers*, 499 U.S. at 406-07. Apart from voting, for most citizens, jury service represents "their most significant opportunity to participate in the democratic process." *Id.* at

[9] American Bar Ass'n, *Perceptions of the U.S. Justice System* 6-7 (1999), *avaiable at* http://www.abanet.org/media/perception/perceptions.pdf. Seventy-eight percent of respondents believe that the jury system is the fairest way to determine guilt or innocence, and sixty-nine percent believe that juries are the most important aspect of our justice system. *Id.*

407. In significant numbers, persons of color, particularly African Americans, believe that they are not accorded equality before the law and view juries as unrepresentative.[10] However, the opportunity to participate in the administration of justice through jury service significantly increases trust in the fairness of the justice system.[11] Moreover, jury verdicts are most likely to be accepted by the public when they are the product of a diverse jury that is fairly selected.[12]

A recent study concerning public trust and confidence in the Georgia court system was conducted at the request of the Georgia Supreme Court.[13] The research was prompted by a 1999 survey undertaken by the National Center for State Courts, which examined public attitudes toward the judicial system and revealed that African Americans and Hispanics were more likely than whites to agree that "[m]ost juries are *not* representative of the community" (emphasis added).[14] The Georgia Public Trust and Confidence Survey focused on "issues raised by *Batson* and its progeny."[15] It also asked respondents whether most juries are not representative of the community. The Georgia study found that, whether or not they had served as jurors, a majority of whites agreed with the

[10] National Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey* 29-32, 37-38 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf ("*How the Public Views the State Courts*").

[11] George W. Dougherty et al., *Race and the Georgia Courts: Implications of the Georgia Public Trust and Confidence Survey for Batson v. Kentucky and its Progeny*, 37 Ga. L. Rev. 1021, 1030-32 (2003) ("*Georgia Public Trust and Confidence Survey*").

[12] *See, e.g.*, Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition, Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033 (2003) ("*Race, Diversity and Jury Composition*").

[13] *See Georgia Public Trust and Confidence Survey, supra*, at 1021.

[14] *See How the Public Views the State Courts, supra*, at 7, 29.

[15] *See Georgia Public Trust and Confidence Survey, supra*, at 1022.

statement (57.3 percent compared to 53.5 percent). However, 66 percent of African Americans who had no prior jury service agreed compared to 46.7 percent of those who had sat as jurors.[16]

Rigorous, steadfast enforcement of the Court's *Batson* jurisprudence is critical to integrity of the jury system and to the public's acceptance of jury verdicts. *Amici* believe that *Batson* offers the most effective, long-term safeguard against jury nullification as well as a vital means of ensuring public confidence in the verdict when there is a conviction.[17] A survey of jury-eligible individuals found that when the jury was diverse, the verdict—conviction or acquittal—did not influence perceptions of the trial's fairness.[18] However, when the jury did not include minority members, observers viewed the trial as less fair if it produced a guilty verdict.[19] National conviction rates are close to 90 percent.[20] "If the racial composition of a jury is more likely to affect perceptions of the fairness of the trial procedure when the trial results in a conviction, jury composition will be an important factor [in reinforcing perceptions of fairness] in a majority of criminal trials."[21]

Taken together, these results affirm that jury service tends to improve public perception of the courts. The statistically

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[16] *Id.* at 1033.

[17] *See e.g.*, Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 U. Mich. J.L. Reform 285, 316 (1999); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw. U. L. Rev. 877, 937 (1999).

[18] *Race, Diversity and Jury Composition*, *supra*, at 1049.

[19] *Id.*

[20] *Id.* at 1049-50 & n.43 (citing Carol J. DeFrances & Greg W. Steadman, Bureau of Justice Statistics Bull., *Prosecutors in State Courts, 1996*, at 5 (1998)).

[21] *Id.* at 1050.

significant differences between African Americans who have served as jurors and those who have not provides evidence to support the Court's concern in *Batson* that excluding African Americans from juries undermines perceptions of fairness in our system of justice.[22] This perception of fairness, in turn, is critical to ensuring both that jurors perform their sworn duties with dispassionate fairness, based only on the law and the facts, and that their judgments are accepted by the public.

Furthermore, the Court must ensure that there are sanctions whenever any party engages in intentional discrimination in jury selection. *Strickler v. Greene*, 527 U.S. at 281 (the goals of the criminal justice system are not met when a guilty man is convicted by constitutionally improper means). Failure to enforce this rule will severely undermine public confidence in the integrity of the judicial process as a forum in which constitutional violations are vindicated. No participants in the justice system, including judges and prosecutors, are served by that outcome.

B. The Fifth Circuit's Opinion Undermines the Court's Opinions in Both *Miller-El* and *Batson*.

"[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam). The Fifth Circuit's departure from the Court's opinion in *Miller-El* and the Court's explication of the proper steps of analysis in *Batson* warrants the Court's intervention and review pursuant to its supervisory authority. Sup. Ct. R. 10 (a).

In *Miller-El*, the Court directed the Fifth Circuit to undertake a review of petitioner's *Batson* claim under the provisions of 28 U.S.C. § 2254(d)(2) & (e)(1). Pet. App. 38a. Addressing the proper standard for review under § 2254(d)(2)

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[22] *Id.* at 1044-45. *See Batson*, 476 U.S. at 87.

& (e)(1), the Court cautioned that "deference does not imply abandonment or abdication of judicial review." *Id.* at 37a. It underscored that the statutory constraints of the Antiterrorism and Effective Death Penalty Act ("AEDPA") "do[] not by definition preclude relief," and that "[a] federal court can disagree with a state court's credibility determination" under either or both subsections of § 2254. *Id.*

The only issue on remand was step three of the *Batson* inquiry. Pet. App. 35a. The Fifth Circuit's insistence on "too demanding a standard" for the granting of a COA and its failure to "give full consideration to the substantial evidence petitioner put forth in support of the prima facie case" led the Court to furnish a blueprint for deciding the merits of petitioner's claim. *Id.* at 38a.

In providing this blueprint, the Court "explain[ed] in some detail the extensive evidence concerning the jury selection procedures [during petitioner's trial]," which consisted both of facts "relating to a pattern and practice of race discrimination in the *voir dire*" and evidence "directly related to the conduct of the prosecutors in his case." Pet. App. 28a. The Court characterized its review of the evidence as a "preliminary, though not definitive, consideration of the three-step framework mandated by *Batson*" for the purpose of determining whether a COA should have issued. *Id.* at 35a. This preliminary consideration examined the evidence with a focus upon the third step of the *Batson* inquiry, when the "critical question" is "the persuasiveness of the prosecutor's justification for his peremptory strike." *Id.*

1. The Fifth Circuit's opinion on remand undid entirely the Court's analytical framework by declaring that "it is important to identify the prosecution's stated reasons for exercising a peremptory challenge. *Once we have identified the reasons for the strikes, the credibility of the reasons is*

self-evident." Pet. App. 10a-11a (emphasis added).[23] The entirety of the Fifth Circuit's opinion simply begs the very question that this Court expressly declared it should consider, and should consider with some care in light of petitioner's weighty evidence. In its opinion, this Court criticized both the district court and the Fifth Circuit for failing to "give full consideration to the substantial evidence petitioner put forth in support of the prima facie case." *Id.* at 38a. The Fifth Circuit not only has repeated that error, but has done so in a manner that will compound its error in future cases.

The Fifth Circuit has created a tautological framework for review of *Batson* challenges. At step three of a *Batson* inquiry, as this Court noted, "the trial court must determine whether the defendant has shown purposeful discrimination." Pet. App. 25a-26a. Obviously, the credibility of any facially neutral reason for a challenged strike lies at the very heart of determining whether that reason was in fact pretexual and whether there was purposeful discrimination. "[T]he issue [in the third step] comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *Id.* at 35a. Early in its opinion, the Fifth Circuit declared that it is undisputed "that the prosecution presented facially race-neutral reasons for exercising each peremptory challenge." *Id.* at 7a. Having subsequently declared those reasons, once divined by the court, to be "self-evident[ly]" credible (*id.* at 11a), it will always be true that anytime a race-neutral explanation is proffered in response to a *Batson* challenge, the results of the third step will favor the non-moving party as

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[23] Of course, a trial court's credibility findings are entitled to deference, and should be upheld unless clearly erroneous, and, in the context of habeas, unreasonable in light of the evidence presented. But this is not what the Fifth Circuit said or did in this case. To say that a reason is "self-evident[ly]" credible (Pet. App. 11a) is to *decide* the credibility question rather than, as this Court expressly ordered, engaging in further analysis to determine whether the prosecution's explanations were in fact credible in light of the totality of petitioner's evidence. *See id.* at 35a.

long as the explanation is not facially preposterous. Such a framework makes the third step of *Batson* meaningless. Unless the non-moving party fails to proffer any facially neutral reason at step two, it will survive the challenge.

In driving to this result, however, the Fifth Circuit did not create a rule for only this case. That facially neutral reasons are *self-evidently* credible, once identified by an appellate court, is a rule that courts in the Fifth Circuit will apply to other cases. This rule converts *Batson*'s three steps into two. Following the Fifth Circuit's model, courts would accept race-neutral explanations shorn of their full context and could not, consistent with the demands of the Equal Protection Clause, determine whether the proponent had met his ultimate burden of persuasion. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). The Fifth Circuit's approach thus gives "deference" a meaning neither sanctioned by this Court nor tolerable under § 2254.

Despite its fatal logical flaw, this rule is a powerful and seductive tool. The Fifth Circuit's own analysis demonstrates how this is so. The Court measured some (but, importantly, not all) of petitioner's evidence against what it viewed to be self-evidently credible racially neutral justifications for the strikes. Unsurprisingly, petitioner's evidence did not overcome this dispositive characterization of the neutral reasons proffered by the prosecutors. *No* amount of evidence of purposeful discrimination—short of direct evidence that the proffered reasons were lies—could overcome a prior determination that the proffered neutral reasons are credible and therefore innocent in their intent. Because the Fifth Circuit not only ignored the Court's carefully constructed analytical framework for assessing claims like petitioner's, but also created a rule that fundamentally departs from this Court's precedents in *Purkett*, *Hernandez v. New York*,[24] and *Batson* itself, *certiorari* is warranted.

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[24] 500 U.S. 352 (1991) (plurality opinion).

2. The Fifth Circuit's consideration of petitioner's evidence, as cursory as it may have been, itself so far departed from this Court's "preliminary … consideration" of petitioner's prima facie case that review is warranted for this reason as well. Pet. App. 35a. The Fifth Circuit fails entirely to address central points that this Court made regarding reasonable inferences of purposeful discrimination that follow from certain specific evidence adduced by petitioner. Where it does address evidence presented by petitioner, the Fifth Circuit offers perfunctory and incomplete analyses that only serve to highlight further the flaw in its own analytical framework. In sum, the court of appeals paid no more than lip service to the requirement in making the credibility determination that there must be a collective evaluation of the "facts and circumstances that were adduced in support of the prima facie case." *Id.* at 37a.

a. Remarkably, the Fifth Circuit did not once acknowledge that prosecutors used peremptory strikes to remove 91 percent of the eligible African American prospective jurors and only 13 percent of the white jurors. This particular piece of evidence is significant in two respects: (1) it is powerful circumstantial evidence of discriminatory intent; and (2) this Court itself took note and concluded that "[h]appenstance is unlikely to produce this disparity." Pet. App. 28a, 39a.

Further, the Fifth Circuit disregarded specific conclusions drawn by this Court—readily apparent from the COA inquiry—that "[d]isparate questioning did occur" and that the manipulative questioning regarding the minimum punishment for murder was almost exclusively directed at African Americans who expressed ambivalence about the death penalty. Pet. App. 40a-42a. Rather than conduct its own analysis, the Fifth Circuit adopted, sometimes *verbatim* and always without attribution, the State's arguments and the

dissenting opinion in *Miller-El*. Pet. 16, 17, 19, 21.[25] In doing so, it also borrowed the notion from the dissenting Justice in *Miller-El*,[26] which was clearly rejected by this Court, that when a prosecutor's reasoning is absent from the record, it may be supplied by hypothesis.[27] For example, the Fifth Circuit, adopting the rationale of the dissent in *Miller-El*, presumed that disparate questioning about the death penalty was justified based upon the differences in jurors' answers on their questionnaires despite the fact that the questionnaires of most of the white jurors were not part of the record. Pet. App. 19a-20a. *See also id.* at 61a-62a (Thomas J., dissenting); Pet. 17 & n.2. Likewise, the Fifth Circuit improperly dismissed circumstantial evidence in adressing the issue of disparate questioning, departing again from this Court's guidance in *Miller-El* that "'under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."'" Pet. App. 42a (quoting *Batson*, 476 U.S. at 93).

Finally, the Fifth Circuit declined to follow even the test set forth by this Court for answering the central question on remand, the persuasiveness of the prosecutors' justification

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[25] Significant portions of the Fifth Circuit's opinion are unattributed, verbatim passages of the State's briefs below and the dissent in *Miller-El*. *Compare* Pet. App. 11a-18a, *with* Brief of Appellee (on remand) at 6-13, 16-18, *and* Brief of Respondent at 3-8, 11-12, *Miller-El*, 537 U.S. 322 (2003); *compare* Pet. App. 19a-21a, *with id.* at 61a-64a (Thomas, J., dissenting).

[26] Pet. App. 19a-20a.

[27] In discussing the prosecution's disparate questioning of black and white jurors, the Court found that "[n]o explanation is proffered for the statistical disparity" and, further, that had evidence be available to refute petitioner's assertion, "'it cannot be assumed that the [prosecution] would have refrained from introducing it'" Pet. App. 41a-42a (quoting *Norris v. Alabama*, 294 U.S. 587, 594-95 (1935)).

for their peremptory strikes. Pet. App. 35a. The Fifth Circuit said nothing about the test for assessing credibility. It said nothing about whether the reasons proffered by the prosecutors were probable or improbable (the latter warranting less weight and greater scrutiny). *Id.* And it said nothing about whether the proffered reasons had "some basis in accepted trial strategy." *Id.* This degree of departure from the Court's opinion, however, necessarily follows from the Fifth Circuit's development of its own analytical framework in which the credibility determination is self-evident and not open to question.

b. In *Miller-El*, the Court criticized the state courts' failure to consider the historical evidence at step one and their conclusion that "there was not even the inference of discrimination to support a prima facie case." Pet. App. 44a. On remand, the Fifth Circuit declared that "the relevancy of this evidence is less significant [at step three] because Miller-El has already met the burden under the first step of *Batson* and now must prove actual pretext in his case." *Id.* at 9a-10a. But this attempt to diminish the weight of Miller-El's "historical" evidence fails for two reasons. First, the Fifth Circuit thereby disregarded the directive in *Miller-El* that this historical evidence, which "casts doubt on the legitimacy of the motives underlying the State's actions" (*id.* at 43a) be part of the ultimate calculus "[i]n resolving the equal protection claim." *Id.* at 44a. Even if this historical evidence were only "circumstantial," that would not diminish its relevance to the issue of whether the proffered justifications were pretextual. This Court has never held that circumstantial evidence of discrimination is any less probative than direct evidence in conducting the step three analysis. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (courts must inquire into "such circumstantial and direct evidence of intent as may be available"). In sum, the court below turned *Batson* on its head by concluding that the more powerful the prima facie case, the less relevant the

evidence supporting the prima facie case is to the final inquiry.

Second, the historical evidence *was* inextricably intertwined with the conduct of the prosecutors in selecting the jury at petitioner's trial. *Both* of petitioner's prosecutors had been members of the District Attorney's Office when that agency formally trained its lawyers to exclude minorities from jury service, and one of the prosecutors had been found by a Texas appellate court to have engaged in race-based jury selection in another capital trial. Pet. App. 42a-43a. This crucial aspect of petitioner's historical evidence led to this Court's "supposition that race was a factor" in the prosecution's jury selection methods. *Id.* Yet, the Fifth Circuit ignored this evidence entirely in its opinion.

The Fifth Circuit also gave painfully short shrift to evidence concerning the Texas practice of "jury shuffles," noting only that defense counsel had requested more shuffles than the State. Pet. App. 10a. In the absence of any other evidence, the fact that defense counsel also shuffled the jury might indeed indicate that the prosecutors having done so was not out of the ordinary. But, again, this disregards entirely this Court's conclusion that the manner and timing of the prosecution's decisions to seek a jury shuffle "tend[] to erode the credibility" of the state. *Id.* at 42a. That is because the prosecution's shuffles occurred when there were African Americans seated in the front of the panel. *Id.* Prosecutors also waited to object to defense shuffles until the results of those shuffles, in terms of racial composition, became apparent. *Id.* The Fifth Circuit's approach to the evidence of jury shuffles exemplifies how it repeatedly Balkanized petitioner's evidence, taking selective items of proof in isolation, and failed to consider "all relevant circumstances" at step three. *Batson*, 476 U.S. at 93, 96-97.[28]

[28] *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (noting that the fact finder, in deciding the ultimate question of discrimination, may consider the plaintiff's prima facie case "'and inferences properly drawn therefrom'").

The logical flaws in the Fifth Circuit's analysis and its repeated failures even to address problematic evidence that was highlighted in this Court's opinion demonstrate that the State fails at the *Batson*'s third step. This Court found that disparate questioning of jurors regarding their views on the death penalty did occur and that "the differences in questions posed by the prosecutors are some evidence of purposeful discrimination." Pet. App. 40a-41a. When coupled with the evidence regarding the racial disparity in the strikes exercised by the prosecution and the evidence of jury shuffles, the prosecutors' generalized, post-hoc race-neutral justifications are overborne by petitioner's much more specific evidence. Standing alone, this evidence is sufficient to show that the state court's original findings were clearly erroneous. The historical evidence, and the connection of that historical evidence to this case, makes that conclusion unassailable.

3. While this case is a benchmark, the nature of the benchmark remains undetermined. Left as precedent, the Fifth Circuit's revision of the *Batson* inquiry would insulate invidious discrimination by "'those ... of a mind to discriminate,'" *Batson*, 476 U.S. at 96, by relieving judges—whether at trial, on direct or collateral review—of the duty to engage in an analysis of the totality of the evidence at the step three. Given the numerous possible grounds for challenging a juror, race-neutral explanations for exercising strikes are not difficult to invent.[29] *Unless these explanations can be tested against the weight of all the prima facie evidence*, it becomes

[29] William E. Martin & Peter N. Thompson, *Judicial Toleration of Racial Bias in the Minnesota Justice Sys.*, 25 Hamline L. Rev. 235, 266 (2002) (noting that acceptable race-neutral reasons for striking a minority juror include living in the same neighborhood as the defendant, living in a large city, being new to the neighborhood, involvement in the criminal or juvenile justice system, answering questions too quickly, being young and inexperienced, being a foster care worker, or knowing a state witness twelve years prior to trial).

impossible to "erode the credibility of the [opponent's] assertion" sufficient to carry the ultimate burden of persuasion. Pet. App. 42a; *see also Hernandez*, 500 U.S. at 369 (plurality opinion). The result, exemplified by the outcome on remand, is that meritorious *Batson* challenges become a futile exercise.

Given the overwhelming nature of petitioner's evidence and this Court's opinion reviewing that evidence in the context of the COA, *amici*'s greatest concern lies with the damage that the Fifth Circuit's decision (and petitioner's potential execution resulting therefrom) will inevitably do to the public reputation and integrity of our court system. Judges and prosecutors must each day contend with a public that only tentatively places its trust in our judicial system. A decision like the Fifth Circuit's will have a negative effect on the day-in and day-out activities of our colleagues charged with making this system work.

Federal judicial review on habeas should be conducted only within the parameters of the relevant statutory and constitutional limitations. But if the public is to have confidence in the prosecutorial and judicial functions, that review must take place. The intended outcome is that only exceptional cases will meet the stringent test for relief under the AEDPA. However, public confidence cannot be maintained when federal courts decline to grant relief when, as here, it is clearly warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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APPENDIX

APPENDIX

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The Honorable Arlin M. Adams served as a judge of the United States Court of Appeals for the Third Circuit from 1969 to 1987, and as Director of the Federal Judicial Center from 1986 to 1987. He served as an Independent Counsel from 1990 until 1995. He is currently of counsel to Schnader Harrison Segal & Lewis LLP in Philadelphia, Pennsylvania.

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